CAREN P. SENCER, Bar No. 233488
LISL SOTO, Bar No. 261875
CAROLINE N. COHEN, Bar No. 278154
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: csencer@unioncounsel.net
lsoto@unioncounsel.net
ccohen@unioncounsel.net
nlrbnotices@unioncounsel.net

Attorneys for Petitioner and Charging Party
International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 720

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

David Saxe Productions & V Theater Group, Joint Employers and International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 720.	No. 28-CA-219225 and No. 28-RC-219130 **IATSE LOCAL 720'S BRIEF IN SUPPORT OF GISSEL ORDER FOR TWO BARGAINING UNITS DISTINCT FROM UNIT SET FORTH IN STIPULATED ELECTION AGREEMENT**

International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 720 ("Local 720" or "Union"), by its undersigned counsel of record, files this brief in support of a *Gissel* order for two bargaining units distinct from that provided in the parties' stipulated election agreement.

I. INTRODUCTION

On April 24, 2018, Local 720 filed an unfair labor practice charge in case no. 28-CA-219225. On April 26, 2018, Local 720 filed a RC petition in case no. 28-RC219130 seeking to

represent a unit of stage technicians, audio technicians, lighting technicians and warehouse technicians at David Saxe Productions and Saxe and V Theater Group LLC (hereinafter collectively referred to as "DSP" or "Employers"). In the employers' Statement of Position, DSP took the position that wardrobe technicians should be added to the unit.

The parties attended a hearing in the RC case wherein the parties took some testimony from DSP owner David Saxe relating to the employers' proposed inclusion of wardrobe technicians in the unit. After some testimony was taken on the relevant community of interest factors, the parties entered into a stipulated election agreement providing for a unit of stage technicians, audio technicians, lighting technicians and wardrobe technicians. Local 720 entered into the stipulated election agreement for a unit including wardrobe technicians out of a compromise to move forward with an election without awaiting a Decision and Direction of Election from the Regional Director. The Regional Director approved the stipulated election agreement on May 9, 2018.

Following the election that took place on May 17, 2018, the Union and the Employers both filed objections to the conduct of the election and position statements on the seven challenged ballots. Subsequently, the Union filed additional unfair labor practice charges alleging various 8(a)(1) and 8(a)(3) violations. The General Counsel issued a Complaint on July 9, 2018 and a Consolidated Complaint on August 20, 2018. One of the remedies sought in the Consolidated Complaint includes a *Gissel* bargaining order for a unit of stage technicians, audio technicians, lighting technicians and spotlight operators and a separate unit of warehouse technicians.

At the hearing on the Consolidated Complaint, on or about September 12, 2018, Administrative Law Judge Anzalone ordered all parties to submit briefs by September 16, 2018 on the issue of whether a *Gissel* order may be sought for a unit different than that provided for in the parties' stipulated election agreement and than that which voted in the election. Administrative Law Judge Anzalone asked the Employers to come forward with authority on whether there is a procedural mechanism precluding the taking of testimony on community of

interest factors in these circumstances. Pending the submission of briefing and decision on the issue, testimony relating to community of interest issues has been held in abeyance since September 12, 2018.

II. ARGUMENT

A. GUIDING PRINCIPLES SUPPORT THE *GISSEL* ORDER SOUGHT BY THE GENERAL COUNSEL

Congress granted the Board with the authority to remedy unfair labor practices under Section 10(c) "to take such affirmative action… as will effectuate the policies of this Act." *Gourmet Foods*, 270 N.L.R.B. 578, 584 (1984). That authority is undeniably "broad" and is "subject to limited judicial review." *Id*. The authority has been recognized as limited when its exercise would "violate a fundamental premise on which the Act is based." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). For the reasons set forth below, the remedy the General Counsel seeks for a *Gissel* bargaining order covering a unit of stagehands, lighting technicians, audio technicians and a unit of warehouse technicians is proper under the guiding principles of Board law.

When filing a RC petition, a union may chose which unit it seeks to represent so long as it is *an* appropriate unit, even if there may exist other appropriate units. It is well settled that there is more than one way in which employees may appropriately be grouped for purposes of collective bargaining. See, e.g., *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422–423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); and *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). In outlining the standards for assessing unit appropriateness, the NLRB Outline of Law and Procedure on Representation Proceedings, Section 12-100, states in relevant part:

> The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. *See, e.g., Overnite Transportation Co*., 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997)

The bargaining unit a union seeks to represent need not be the *most* appropriate unit, so long as it is appropriate under the traditional community of interest factors. Under these Board precepts, a *Gissel* order similarly may cover *an* appropriate unit wherein the Union had a card majority. DSP's unfair labor practices have tainted the ability to hold a fair election for *any* appropriate unit, whether or not that unit includes wardrobe technicians. The *Gissel* remedy sought by the General Counsel parallels the unit Local 720 sought in its RC petition as it sought to represent stagehands, lighting technicians, audio technicians and warehouse technicians. The General Counsel has the authority to seek a *Gissel* order for this unit as it is in line with Board principles that allow a union to petition for an appropriate collective bargaining unit, and significantly, doing so will effectuate the policies of the Act. See *Gourmet Foods*, *supra*, at 584; see also *Regional Home Care, Inc.*, 329 N.L.R.B. 85 (1999).

B. THERE EXISTS NO AUTHORITY THAT PRECLUDES THE *GISSEL* REMEDY SOUGHT BY THE GENERAL COUNSEL

At the hearing on the Consolidated Complaint, the Employers cited to Hilton Hotels Corp., 282 N.L.R.B. 819 (1987) for the proposition that there is no basis to litigate unit appropriateness vis-à-vis a *Gissel* order at an unfair labor practice hearing. It is true that *Hilton Hotels* did not decide on the question of unit appropriateness of the narrower unit of only stage technicians, but the reasons for declining to do so were based on factors distinct from those present in the instant case. In relevant part, the Board reasoned as follows when finding that unit appropriateness need not be decided in *Hilton Hotels*:

> Since the parties have agreed that the broader unit (including wardrobe) is an appropriate one, since previous representation elections were conducted in that broader unit, *since there is a union majority in either unit, and considering finally that the parties did not litigate the status of wardrobe employees nor provide any legal argument on the narrower unit question*, I find only that the broader unit is appropriate and do not decide whether the narrower unit might also be an appropriate one.
>
> *Id*. (emphasis added).

Namely, in *Hilton Hotels*, the parties stipulated to the appropriateness of the broader unit in which the Union had majority support, and thus the parties did not need to litigate unit

appropriateness. Neither side litigated the status of wardrobe employees in the case, nor provided any legal argument as to the narrower unit question because there was a stipulation as to the appropriateness of the larger unit and because the union had a majority in both the smaller and larger units.[1] Unlike the present case, there was no need to litigate unit appropriateness in *Hilton Hotels* because the parties agreed that the particular unit in which the *Gissel* order was sought was appropriate and there was no need not do so given both units in question had majority status.

In significant part, the Board in *Hilton Hotels* did not limit the *Gissel* order remedy to only a unit in which the union had filed the RC petition, nor did it limit *Gissel* orders to only a unit in which a previous election was conducted. These factors were among a list of several others cumulatively considered in finding that the unit appropriateness of the narrower unit need not be decided, but principally because the question was mooted by the parties' stipulation to appropriateness of a unit wherein there was no dispute as to the Union's majority status. The question as to unit appropriateness as between the larger and smaller units in *Hilton Hotels* was further mooted because the Union had majority support in either sized unit, including the larger one in which the *Gissel* remedy was sought.

The Employers' citation to the NLRB Case Handling Manual Section 11452.2 for the proposition that the unit sought in a *Gissel* must be the same as that which voted in the election is likewise unavailing. Id. [stating "[t]he voting unit(s) or group(s) in a rerun election will be the same as in the original election."]. Section 11452.2 of the CHM concerns the re-running of an election when election objections are found to have merit. In contrast, a *Gissel* order is a bargaining order issued when a fair re-run election is not possible given the serious nature of an employer's unfair labor practices because the employer's pervasive practices have the tendency to undermine majority strength and impede the election processes. *Gissel*, 395 U.S. at 614. Thus,

[1] Whether the petitioner's motive in seeking a separate unit is guided by the extent to which the union had organized is immaterial so long as the Board, in its choice of an appropriate unit, does not give *controlling weight* to that fact. *Stern's Paramus*, 150 NLRB 799, 807 (1965); NLRB Outline of Law and Procedure in Representation Cases, Section 12-300. Thus, DSP's argument at hearing that it would be required to subpoena union representatives to determine the extent of organizing among particular production crew employees is not only unnecessary, but improperly impedes on employees' Section 7 rights under *Guess?, Inc*., 339 NLRB 432 (2003).

Section 11452.2 of the CHM is inapplicable to the issue of which bargaining unit a *Gissel* bargaining order covers as the fundamental purpose of a *Gissel* order recognizes that a fair, re-run election is not feasible. Thus, DSP has failed to come forward with any authority to show that the *Gissel* remedy sought by the General Counsel would violate a fundamental premise on which the Act is based. *H.K. Porter Co., supra,* at 108.

III. CONCLUSION

For the reasons set forth above, there is no legal basis precluding the General Counsel from seeking the remedy of a *Gissel* order covering one unit of stage technicians, audio technicians, lighting technicians and lighting operators and a separate unit of warehouse technicians.

Dated: September 17, 2018

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/CAROLINE N. COHEN
By: CAROLINE N. COHEN

Attorneys for Petitioner and Charging Party International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 720

CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Los Angeles, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On September 17, 2018, I served the following documents in the manner described below:

IATSE LOCAL 720'S BRIEF IN SUPPORT OF GISSEL ORDER FOR TWO BARGAINING UNITS DISTINCT FROM UNIT SET FORTH IN STIPULATED ELECTION AGREEMENT

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from gbautista@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Cornele A. Overstreet, Regional Director
National Labor Relations Board, Region 28
Resident Office
600 South Las Vegas Boulevard, #400
Las Vegas, Nevada 89101-6637
Email: cornele.overstreet@nlrb.gov

Sara Demirok
National Labor Relations Board, Region 28
2600 N. Central Avenue, Suite 1400
Phoenix, AZ 85004
Email: sara.demirok@nlrb.gov

Elise F. Oviedo
National Labor Relations Board, Region 28
Las Vegas Resident Office
300 Las Vegas Blvd. South, Ste. 2-901
Las Vegas, NV 89101-5833
Email: elise.oviedo@nlrb.gov

Nicole A. Young
Gregory J. Kamer
Kamer Zucker Abbott
3000 West Charleston Boulevard, Suite 3
Las Vegas, NV 89102
Email: nyoung@kzalaw.com
Email: gkamer@kzalaw.com

Rodolfo "Rudy" Martinez
National Labor Relations Board, Region 28
Albuquerque Resident Office
421 Gold Avenue SW, Suite 310
Albuquerque, NM 87103-2181
Email: Rodolfo.Martinez@nlrb.gov

Counsel for David Saxe Productions & V Theatre Group

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 17, 2018, at Los Angeles, California.

Lara Hull

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